

S70403-9



**Investment Office**  
P.O. **Box** 2749  
Sacramento, **CA** 95812-2749  
Telecommunications Device **for the Deaf** - (916) 326-3240  
(916) 326-3400  
; **FAX** (916) 326-3330

2003  
APR 10 10:03 AM

April 8, 2003

Jonathan G. Katz  
Secretary  
U.S. Securities and Exchange Commission  
450 Fifth **Street**, NW  
Washington, DC 20459-0609

Re: File No. S7-04-03

Dear Mr. Katz,

I am writing to you on behalf of the California Public Employees' Retirement System (CalPERS). CalPERS is the largest public pension system in the U.S., with approximately \$135 billion in assets. We manage retirement benefits and health insurance on **behalf** of nearly 1.3 million members.

CalPERS **is** pleased to provide comment on the Commission's proposed amendments to **its** Rules of Practice, which are designed to expedite the Commission's administrative proceedings. **As** an investor protected by the Commission's enforcement efforts, CalPERS is strongly supportive of the Commission's effort to make its administrative proceedings more efficient, and hence a greater deterrent to would-be wrongdoers.

We applaud the Commission's decision to tailor deadlines for initial decisions **by** administrative law **judges** according to the nature, complexity, and urgency of the subject matter, to make such deadlines mandatory, **and** to formalize **its** policy against granting extensions of time and postponing or adjourning hearings. **We** also support the Commission's decision to **reduce** by four months its target deadline for issuance of **its** own decisions. We feel such measures represent reasonable, workable solutions to the problem of needless delays, which can undermine the repute of, and confidence in, enforcement proceedings. **As** William Ewart Gladstone famously said, "justice delayed is justice denied."

Although **we** believe the Commission's proposed amendments would mark a substantial step forward if adopted "**as is**," we would like to offer a few technical suggestions for strengthening and refining two of the rules - 17 C.F.R. § 201.161 and 17 C.F.R. § 201.360 - consistent with the Commission's overarching goals. Our suggested

language changes are indicated on the enclosed attachments to this letter. **As to** § 201.161, our suggestions are designed to:

- require consideration of whether a party has **been** reasonably diligent when determining whether to grant the party's request to extend time limits or postpone or adjourn a hearing;
- incorporate the Federal **Rules** of Civil Procedure's concept of "excusable neglect" into the standard applicable to parties who demonstrate that denying a request to extend time periods or postpone or adjourn a hearing would substantially prejudice the party's case;
- clarify which standard should be applied when a respondent seeks to postpone Commencement of a cease and desist proceeding **beyond** the 60-day statutory time period;
- avoid disputes regarding what constitutes "prompt notification" by setting a specific time period of five business days for a party to notify the hearing officer that settlement has failed and requiring that the notification **be** in writing;
- clarify that the hearing officer's duty to **dissolve** the stay arises on receipt of the notification; and
- clarify that the period during which a proceeding is stayed while the Commission considers offers of settlement **does** not count against the time period set **by** the Commission for the filing of an initial decision.

**As to** § 201.360, our change is designed to:

- allow for the Chief ALJ to seek extensions within 30 days of the deadline in appropriate, limited circumstance, such as where an ALJ falls gravely ill or otherwise becomes incapacitated.

If you have any questions regarding our comments on the proposed rules or on our suggested technical refinements, please contact me at (916) ~~341~~-2731.

Sincerely,



Ted White  
Director, Corporate Governance

Enclosures

Proposed Additional Amendments To Section 201.161

Sec. 201.161 Extensions of time, postponements and adjournments.

(a) **Availability.** Except as otherwise provided by law, the Commission, at any time, or the hearing officer, at any time prior to the filing of his or her initial decision or, if no initial decision is to be filed, at any time prior to the closing of the record, may, ~~for good cause shown~~ consistent with this section, extend or shorten any time limits prescribed by these Rules of Practice for the filing of any papers ~~and may, consistent with paragraph (b) of this section,~~ or postpone or adjourn any hearing for a reasonable period of time, or change the place of the hearing.

~~(b) Limitations on postponements, adjournments and extensions. A hearing shall begin at the time and place ordered, provided that, within the limits provided by statute, the Commission or the hearing officer may for good cause shown postpone the commencement of the hearing or adjourn a convened hearing for a reasonable period of time or change the place of hearing.~~

~~(e)(1)~~ (b) Considerations in determining whether to grant requests to extend time limits or grant postpone~~ments,~~ or adjourn~~ments, and extensions~~ a hearing. If a party moves to extend time limits for the filing of papers or to postpone or adjourn a hearing, the Commission or hearing officer shall apply the following criteria in determining whether to grant the request:

(1) Except as provided by paragraphs (b)(2) and (b)(3) below, ~~In considering all motions or requests pursuant to paragraph (a) or (b) of this section,~~ the Commission or hearing officer should adhere to a policy of strongly disfavoring requests to extend time limits or to postpone or adjourn a hearing ~~such requests, except in circumstances where the requesting party makes a strong showing that the denial of the request or motion would substantially prejudice their case.~~ In determining whether to grant any such requests, the Commission or hearing officer shall consider, in addition to any other relevant factors:

- (i) The reasonable diligence of the party making the request;
- ~~(i)~~ (ii) The length of the proceeding to date;
- ~~(ii)~~ (iii) The number of postponements, adjournments or extensions already granted;
- ~~(iii)~~ (iv) The stage of the proceeding at the time of the request;
- ~~(iv)~~ (v) The impact of the request on the hearing officer's ability to complete the proceeding in the time specified by the Commission; and
- ~~(v)~~ (vi) Any other such matters as justice may require.

(2) ~~This policy of strongly disfavoring requests for postponement will not apply to any request by a respondent to postpone commencement of a cease and desist proceeding beyond the statutory 60 day period.~~ Notwithstanding paragraph (b)(1), the Commission or hearing officer may grant requests to extend time limits for the filing of papers or to postpone or adjourn a hearing if the requesting party makes a strong showing that denial of the request

would substantially prejudice the requesting party's case and that any neglect on the requesting party's part is excusable.>>

<<(3) Requests by a respondent to postpone commencement of a cease and desist proceeding beyond the 60 day statutory time period may be granted pursuant to paragraph (b)(2) only.>>

<<(d)(1)>> <<(c)>> *Time limit.* Postponements, adjournments or extensions of time for filing papers shall not exceed 21 days unless the Commission or the hearing officer states on the record or sets forth in a written order the reasons why a longer period of time is necessary.

<<(2)>> <<(d)>> *Stay pending Commission consideration of offers of settlement.* If the Commission staff and one or more respondents in the proceeding file a joint motion notifying the hearing officer that they have agreed in principle to a settlement on **all major** terms, then the hearing officer shall stay the proceeding **as to the settling respondent(s)**, or in the discretion of the hearing officer **as to all respondents**, pending completion of Commission consideration of the settlement offer. Any such stay will be contingent **upon** the settling respondent(s) submitting to the Commission staff, within fifteen business days of the stay, a signed offer of settlement in conformance with §201.240, and within twenty business **days** of receipt of the signed offer, the staff submitting the settlement offer and accompanying recommendation to the Commission for consideration. If the **parties** fail to meet either of these deadlines **or** if the Commission rejects the offer of settlement, **<<at least one of the parties must notify>>** the hearing officer **<<in writing within five business days.>>** ~~<<must be promptly notified and, upon>>~~ **<<Upon receipt of such>>** notification<<, >> ~~<<of>>~~ the hearing officer **<<shall dissolve the stay,>>** ~~<<, the stay shall lapse>>~~ and the proceeding will continue. **<<The period during which a stay described by this paragraph is in effect shall not count against the time period for filing an initial decision set by the Commission pursuant to § 201.360.>>**

## Proposed Additional Amendment to Section 201.360

Sec. 201.360 Initial decision of hearing officer.

(a)(1) *When required.* Unless the Commission directs otherwise, the hearing officer shall prepare an initial decision in any proceeding in which the Commission directs a hearing officer to preside at a hearing, provided, however, that an initial decision may be waived by the parties with the consent of the hearing officer pursuant to Sec. 201.202.

(2) *Time period for filing initial decision.* In the Order Instituting Proceedings, the Commission will specify a time period in which the hearing officer's initial decision must be filed with the Secretary. In the Commission's discretion, after consideration of the nature, complexity, and urgency of the subject matter, and, with due regard for the public interest and the protection of investors, this time period will be either 90, 180 or 270 days from the date of the Order. In the event that the hearing officer presiding over the proceeding determines that it will not be possible to issue the initial decision within the specified period of time, the hearing officer should consult with the Chief Administrative Law Judge. Following such consultation, the Chief Administrative Law Judge may determine, in his or her discretion, to submit a motion to the Commission requesting an extension of the time period for filing the initial decision. This motion must be filed no later than 30 days prior to the expiration of the time specified in the Order for issuance of an initial decision <<, **except where exceptional, unforeseeable circumstances arise**>>. The motion will be served upon all parties in the proceeding, who may file with the Commission statements in support of or in opposition to the motion. If the Commission determines that additional time is necessary or appropriate in the public interest, the Commission shall issue an order extending the time period for filing the initial decision.

(b) *Content.* An initial decision shall include: Findings and conclusions, and the reasons or basis therefor, as to all the **material** issues of fact, law or discretion presented on the record and the appropriate order, sanction, relief, or denial thereof. The initial decision shall also state the time period, not to exceed 21 days after service of the decision, except for good cause shown, within which a petition for review of the initial decision may **be** filed. The reasons for any extension of time shall be stated in the initial decision. The initial decision shall **also** include a statement that, as provided in paragraph (d) of this section:

(1) The initial decision shall become the final decision of the Commission **as** to each party unless a party files a petition for review of the initial decision or the Commission determines on its own initiative to review the initial decision as to a party; and

(2) If a party timely files a petition for review or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.

(c) *Filing, service and publication.* The hearing officer shall file the initial decision with the Secretary. The Secretary shall promptly serve the initial decision upon the parties and shall promptly publish notice of the filing thereof in the **SEC** News Digest. Thereafter, the Secretary shall publish the initial decision in the **SEC** Docket; provided, however, that in nonpublic proceedings no notice shall be published unless the Commission otherwise directs.

(d) *When final.* (1) Unless a **party** or an aggrieved person entitled to review files a petition for review in accordance with the time limit specified in the initial decision, or unless the Commission on its own initiative orders review pursuant to Sec. 201.411, an initial decision shall become the final decision of the Commission.

(2) If a petition for review **is** timely filed by **a party** or an aggrieved person entitled to review, or if the Commission upon its own initiative has ordered review of **a** decision with respect to a party or a person aggrieved who would be entitled to review, the initial decision shall not become final as to that party or person.

(e) *Order of finality.* In the event that the initial decision becomes the final decision of the Commission with respect to **a party**, the Commission shall issue an order that the decision has become final as to that party. The order of **finality** shall state the date on which sanctions, if **any**, take effect. Notice of the order shall **be** published in the SEC News Digest and the SEC Docket.